No. _____

In the
Supreme Court of the United States

E. STEPHEN DEAN
Petitioner,

v.

THOMAS K. BYERLEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

E. STEPHEN DEAN
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QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit correctly affirm the trial court's decision to submit the "under color of state law" element to the jury in this civil rights case, when this Court has repeatedly held that a court, rather than a jury, should decide issues of law?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is E. Stephen Dean, an individual citizen of the United States, residing in Piedmont, Missouri.

Respondent

Respondent is Thomas K. Byerley, the former Director of the State Bar of Michigan's Character and Fitness Department.

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RELIEF SOUGHT

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The two decisions of the United States Court of Appeals for the Sixth Circuit are reported at *Dean v. Byerley*, 2005 U.S. App. LEXIS 17830, August 17, 2005, (See, **Appendix A**), and *Dean v. Byerley*, 354 F.3d 540 (6th Cir. 2004).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 17, 2004. Petitioner filed a motion for reconsideration that was denied on September 2, 2005. This petition for writ of certiorari is filed within ninety days of that date. 28 USC §2101(c). This Court has jurisdiction by virtue of 28 USC §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provision:

42 U.S.C. 1983

This Statute provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner E. Stephen Dean graduated from law school at age 60. Shortly thereafter, he filed this 42 USC § 1983 action alleging that Respondent Thomas K. Byerley, the (former) Director of Professional Standards of the State Bar of Michigan, violated the Petitioner's First Amendment rights when the Respondent said that the Petitioner would be denied a law license because of his picketing activities. State-law claims of assault and libel were also included, based upon the Respondent driving his motor vehicle at Petitioner twice and Respondent's publishing of false accusations of criminal conduct by the Petitioner.

In a published decision, the United States Court of Appeals for the Sixth Circuit held that Petitioner had a constitutionally protected right to engage in peaceful targeted residential picketing in the absence of a narrowly tailored and applicable time, place, or manner regulation prohibiting such picketing. *Dean v. Byerley*, 354 F.3d 540 (6th Cir. 2004). Additionally, it was held that the District Court had erred in granting summary judgment to the Respondent official on the basis that he had not acted under color of

state law. In fact, the Court of Appeals acknowledged that the Respondent had already admitted this element. *Dean, supra*, 354 F.3d at 553 ("In his answer, Byerley responded to Dean's allegation that Byerley acted under color of state law by admitting 'that Plaintiff's allegations against Defendant arise from Defendant's status as Regulation Counsel for the State Bar of Michigan.'").

The jury trial in this case began on October 20, 2004, and contrary to this Court's well-established precedent, and contrary to Respondent's admission, the District Court refused to decide the "under color of state law" issue as a matter of law. *See Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S. Ct. 2777, 2782, 73 L. Ed. 2d 534 (1982) (describing the question of whether there is state action as question of law); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n. 6, 100 S. Ct. 1708, 1715 n. 6, 64 L. Ed. 2d 333 (1980) (determining if state action exists is resolution of question of law). Rather, the District Court held that the jury would decide this element. The District Court instructed the jury as follows:

> Acts are done under color of state law -- color of law of a state, not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. The phrase "under color of state law" includes acts done under color of any state law, or county or municipal ordinance, or any regulation issued thereunder, or any state or local custom. In order for unlawful acts of an official to be done "under color of any law," the unlawful acts must be done while the official is purporting or pretending to act in the performance of the official's official duties. The unlawful acts must consist of an abuse or misuse of power possessed by the official only because the person is an official. The unlawful acts must be of such a nature and be committed under such circumstances that they would not

have occurred but for the fact that the person committing them was an official, purporting to exercise official powers. The act of a public official in pursuit of the official's personal aims that is not accomplished by virtue of the official's official authority is not action under color of state law merely because the individual happens to be a public official. If you find that the defendant was acting under color of state law, then you should proceed to the second required element of plaintiff's claim.

The above constituted the extent of the jury's instruction on the "color of state law" issue and the jury returned a verdict in favor of Respondent. When this case reached the Court of Appeals for the second time, it was held that the issue of whether there was state action was properly delegated to the jury.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit incorrectly affirmed the trial court's decision to submit the "under color of state law" element to the jury in this civil rights case, since this Court has repeatedly held that a court, rather than a jury, should decide issues of law.

To prevail on a 42 U.S.C.S. § 1983 claim, a plaintiff must establish that a person acting under color of state law deprived the plaintiff of a right secured by the Constitution or laws of the United States. *Dean v. Byerley*, 354 F.3d 540, 546 (6th Cir. 2004). In concluding that the question of whether Respondent Byerley acted under color of state law should have been an issue for the jury, the District Court and the Respondent relied upon one sentence in the Sixth Circuit's prior opinion in *Dean*: "Contrary to the district court, we conclude that Dean created a genuine issue of material

fact as to whether Byerley acted under color of state law." *Id.* at 544. Once this case again reached the Court of Appeals, the Court stated:

> As Dean sees the matter, the "color of state law" inquiry is a question of law that a district judge must decide. That, however, is not invariably the case. "Although it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." *Chapman v. Higbee Co.*, 319 F.3d 825, 834 (6th Cir. 2003) (en banc) (quotations omitted). In the initial decision in this action, the court decided that this was just such a case given Dean's and Byerley's divergent accounts of what happened on the morning of March 27th when Dean picketed the Byerley residence. The court therefore "conclude[d] that Dean created a genuine issue of material fact as to whether Byerley acted under color of state law." *Dean*, 354 F.3d at 544. In the aftermath of this conclusion, it was not only proper, but indeed quite necessary, for the district court to submit the "color of state law" question and the competing factual allegations surrounding it to the jury.

(Appendix A, p. 4a)

This interpretation of law, however, misses the point. Whether conduct constitutes state action is no simple question of fact. *See Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S. Ct. 2777, 2782, 73 L. Ed. 2d 534 (1982) (describing the question of whether there is state action as question of law); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n. 6, 100 S. Ct. 1708, 1715 n. 6, 64 L. Ed. 2d 333 (1980) (determining if state action exists is resolution of question of law). *See also, Almand v. DeKalb County, Georgia*, 103 F.3d 1510, 1514 (11th Cir. 1997). The question for the jury was not whether Respondent was acting under color of state law, but rather, whether Petitioner's allegations were true. The initial published

decision in *Dean* makes it abundantly clear that if Petitioner's allegations are proven as true, then a constitutional violation occurred.

Appellee even admitted that this action resulted from his governmental function, and the Court of Appeals acknowledged that fact. *Dean, supra*, 354 F.3d at 553 ("In his answer, Byerley responded to Dean's allegation that Byerley acted under color of state law by admitting "that Plaintiff's allegations against Defendant arise from Defendant's status as Regulation Counsel for the State Bar of Michigan."). With that admission, the issue should not have been submitted to the jury. The question for the jury should have been whether it believed Petitioner's version of the facts, not whether the Respondent was acting under color of state law if those facts are believed. As this Court has held: "[i]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001) (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 (1982)).

In the context of a civil rights action, whether an officer was acting under color of law is a legal issue. *Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002). In *Neuens*, the parties stipulated that the defendant officer acted under color of state law. The Sixth Circuit rejected this stipulation, while noting, "Issues of law are the province of courts, not of parties to a lawsuit, individuals whose legal conclusions may be tainted by self-interest." *Id.* "It is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles." *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984). Here, the trial court impermissibly delegated to the jury the trial court's own duty to decide this issue. The decision of whether Respondent acted under color of state law is "an issue of law which should never have been submitted to the jury." *Jennings v. Patterson*, 488 F.2d 436, 438 (5th Cir. 1974).

In support of its decision, the Court of Appeals cited its decision in *Chapman v. Higbee Co.*, 319 F.3d 825 (6th Cir. 2003), where it was stated that "Although it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." That argument, however, is inapplicable here because in this case, the facts in dispute solely centered on whether or not Respondent threatened Petitioner, not whether Respondent was a state actor. Respondent admitted as much in his answer. *Dean*, supra, 354 F.3d at 553. *Chapman* is inapplicable because here, unlike *Chapman*, the Court of Appeals had already decided that assuming the truth of the Petitioner's allegations, a violation of the First Amendment took place. Therefore, *Chapman* is inapposite.

Even if this Court rejects Petitioner's argument that this element should have been decided as a matter of law, the grossly inadequate instruction read to the jury here is analogous to the circumstances in *Adams v. Vandemark*, 787 F.2d 588 (6th Cir. 1986) (unpublished), where the Court of Appeals addressed a trial Court's similarly poor instruction on "color of state law":

> These few words gave the jury little to guide it in making its determination on this crucial element of the claim for relief. *Id.*

There is a difference between telling a jury that something has occurred about which there is a dispute and telling them the legal consequences of an undisputed fact. The former is a jury matter; the latter, one for the court. *United States v. Wunder*, 919 F.2d 34, 36 (6th Cir. 1990). Therefore, because the "acting under color" element is an issue of law, the jury should not have been required to adjudicate this issue. Issues of law are for a Court; issues of fact are for a jury.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

E. STEPHEN DEAN, Plaintiff-Appellant, v. THOMAS K. BYERLEY, Defendant-Appellee.

No. 05-1155

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Aug. 17, 2005

JUDGES: Before: DAUGHTREY, MOORE, and SUTTON, Circuit Judges.

OPINION: PER CURIAM. Stephen Dean argues that Thomas Byerley retaliated against him for exercising his First Amendment rights while picketing Byerley's residence. A jury heard Dean's allegations and rejected them, and Dean now challenges several of the trial court's evidentiary and procedural rulings. Finding no reversible error, we affirm.

I.

Dean graduated from the Thomas Cooley School of Law, and in December 2000 he submitted an application for admission to the State Bar of Michigan. The application called for Dean to list all of the places he had resided in the course of his then-60-year lifetime. Dean became concerned that this application would be considered incomplete because he was unable to identify each of his places of residence. Not wishing to prejudice his application, Dean expressed his concern to the Executive Director of the Bar.

This conversation did not alleviate Dean's concerns and (at least from Dean's perspective) apparently exacerbated them. In March

2001, Dean began picketing about his application and the treatment he had received from the employees of the Michigan Bar. In his first protest, Dean hired two individuals to assist him at $10 apiece, and together the three of them picketed the Michigan State Bar Building.

Dean next picketed the home of Thomas Byerley, the Regulation Counsel and Director of the Professional Standards Division for the Michigan Bar. Members of the Division, which oversees the Michigan Bar's Character and Fitness Department, investigate the backgrounds of all State Bar applicants and assess whether they have the necessary character and fitness to practice law in Michigan. The Department's findings are submitted to the Board of Law Examiners, which has authority to make the ultimate admission decisions about each application.

On the morning of March 27, 2001, Dean, once again accompanied by two for-hire picketers, arrived at the Byerley residence. Because no sidewalk runs in front of Byerley's home, Dean and his associates picketed on the public street in front of the house and, according to Dean, solely on the part of the street in front of that home. According to Byerley, the picketers also demonstrated on his property.

A confrontation occurred when Byerley left his home for work that morning. According to Dean, Byerley threatened to have Dean arrested for illegal picketing, drove his car directly at Dean and told him that due to his illegal picketing he would never practice law in the State of Michigan. After Byerley went to work, Dean and the two other protesters left. Since then, Dean has not picketed Byerley's home or the State Bar Building.

Two days after this confrontation, Byerley sent a letter to Dean. In full, the letter reads:

As you know, you and two other individuals were outside of my private residence on Tuesday, March 27, 2001 carrying signs. Although you have a right to exercise your First Amendment rights on public property, you do not have that right on private property.

On March 27 I verbally told you that you were on private property and that if you did not immediately leave I would call the police. This letter memorializes that statement. You are put on formal notice that you are never welcome on my private property and that if you trespass again I will ask that you be arrested.

Similarly, you are notified that you are not to enter the private property of any other State Bar of Michigan employee or officer.

JA 326.

Dean filed a pro se complaint against Byerley seeking $2 million. Dean brought the claim in the United States District Court for the Western District of Michigan, contending that Byerley: (1) had violated his First and Fourteenth Amendment rights and 42 U.S.C. § 1983 by threatening to arrest Dean or retaliate against him for his residential picketing; (2) had committed a state-law assault by driving his car at Dean; and (3) had committed state-law libel by sending a letter to Dean claiming he had been trespassing.

Byerley moved for summary judgment on the free-speech claim, and the district court granted it, concluding that Dean was not acting under color of state law. We reversed and remanded for a trial, concluding that Dean had "created a genuine issue of material fact as to whether Byerley acted under color of state law." Dean v. Byerley, 354 F.3d 540, 544 (6th Cir. 2004). After a three-day trial, the jury rejected Dean's free-speech claim as well as his state-law claims.

II.

On appeal, Dean does not challenge the sufficiency of the evidence to support the jury's verdict. He instead complains about a number of evidentiary and procedural rulings.

He first argues that the district court should not have asked the jury to decide whether Byerley acted under color of state law when he threatened to take adverse action against Dean's bar application if Dean continued picketing in front of his house. As Dean sees the matter, the "color of state law" inquiry is a question of law that a district judge must decide. That, however, is not invariably the case. "Although it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." Chapman v. Higbee Co., 319 F.3d 825, 834 (6th Cir. 2003) (en banc) (quotations omitted). In the initial decision in this action, the court decided that this was just such a case given Dean's and Byerley's divergent accounts of what happened on the morning of March 27th when Dean picketed the Byerley residence. The court therefore "conclude[d] that Dean created a genuine issue of material fact as to whether Byerley acted under color of state law." Dean, 354 F.3d at 544. In the aftermath of this conclusion, it was not only proper, but indeed quite necessary, for the district court to submit the "color of state law" question and the competing factual allegations surrounding it to the jury.

In a related contention, Dean argues that the substance of the "color of state law" jury instruction was erroneous. The district court used the model jury instruction from 3B O'Malley, Federal Jury Practice & Instructions, Civil, § 165.40 (5th ed.). As Dean did not object to this instruction at trial, he has the burden of showing plain error on appeal. See Fed. R. Civ. P. 51(d)(2). Not only is it improbable that

a district court's reliance on model jury instructions would amount to plain error but Dean also has offered no meaningful authority to show that the use of these model instructions was in fact mistaken.

Dean next argues that he should receive a new trial based on the opening statement of Byerley's counsel. In his opening statement, Byerley's counsel mentioned two areas of anticipated evidence: Dean's picketing at the residence of a law school professor and Dean's allegations of emotional distress arising from separate incidents that had occurred in Missouri. After the opening statements, Dean objected to the admissibility of this evidence and to the references to these incidents in Byerley's opening statement. The district court accepted Dean's admissibility argument, excluded the proposed evidence and instructed the jury that the "opening statement was not evidence in this case," that "there will be no evidence of other lawsuits brought by Mr. Dean," and that the jury "must decide the case based solely on the evidence in this case." JA 106-07. The jury is presumed to have followed these instructions, see Shanklin v. Norfolk Southern Ry. Co., 369 F.3d 978, 991 (6th Cir. 2004), and at any rate Dean has failed to show that any improper arguments "consistently permeated the entire trial from beginning to end," Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352, 361 (6th Cir. 1997). For many of the same reasons, Dean's argument that the district court should have granted his motion for a mistrial after the opening statement fails. See Beck v. Haik, 377 F.3d 624, 643 (6th Cir. 2004) ("In appeals of civil cases, grants of mistrial on the basis of a single episode of improper questioning or argument have been rare.").

In another challenge to the opening statement, Dean contends that the district court erred by allowing Byerley's counsel to state that the evidence would show that Dean came onto Byerley's property on March 27, 2001. According to Dean, this amounted to the introduction of "a new [] and previously unasserted affirmative

defense," Dean Br. at 46--namely, trespass--that should have been included in the pleadings under Fed. R. Civ. P. 8(c). The district court found that Dean "had ample notice" of the evidence and that Dean had "failed to show how he was prejudiced by the admission of Byerley's testimony on that issue." D. Ct. Op. at 8.

Even assuming for the sake of argument that Byerley's decision to raise this issue during opening statements amounts to the assertion of an affirmative defense, a point we need not decide, the parties' long-standing dispute over this evidence demonstrates that Dean cannot plausibly claim he was either surprised or prejudiced by this reference during opening statement rather than in the answer. "It is well established [] that failure to raise an affirmative defense by responsive pleading does not always result in waiver." Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993). "The purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it." Huss v. King Co., 338 F.3d 647, 651 (6th Cir. 2003) (quotation and brackets omitted). "If a plaintiff receives notice of an affirmative defense by some means other than pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice. " Id. In his complaint, Dean alleged that he "never entered [Byerley's] personal property." Am. Compl., P 8, JA 32. In the count containing the defamation claim he again alleged that he "had not trespassed on Defendant's property." Am. Compl., P 38, JA 34. Byerley denied these allegations in his answer, stating that "although Plaintiff does have the right to peaceably picket on public property, he does not have that right on private property." Answer, P 21, JA 43. The prior appellate opinion in this case acknowledged the existence of a dispute over this evidence: "Dean alleges that he and the hired individuals only picketed on the street in front of Byerley's residence. Byerley, on the other hand, alleges that Dean and the hired individuals also picketed on Byerley's private property." Dean, 354 F.3d at 544-45. From start to finish, in

other words, one of the central issues in the case has been whether Dean stepped onto Byerley's property or picketed on public property alone. On this record, Dean cannot tenably claim unfair surprise when Byerley pursued his long-standing and long-expressed theory of the case by mentioning it in opening arguments.

Dean next claims that the district court abused its discretion by excluding a "Notice of Referral" of Dean's application to a state-bar character and fitness committee that purportedly showed that Byerley had retaliated against Dean's picketing by interfering with his bar application. Dean received the notice on June 13, 2001. At a hearing two months later, Dean told the district court that he had no intention of making a claim that Byerley "did anything to prevent [him] from being admitted to the bar." JA 50. "I'm alleging," Dean stated, "that at the moment that the incident occurred I became afraid to exercise my constitutionally protected rights by . . . picketing, and that it had a chilling effect on my constitutional rights." JA 50. The district court confirmed this, stating: "Okay. So the issue of whether or not you're qualified to be a member of the bar or whether or not you have been or will be admitted to the bar, or whether this defendant has or would do anything to improperly keep you from being admitted to the bar, none of that would be an issue in this lawsuit?" JA 52. Dean responded: "Absolutely not." JA 52. Based on these representations, the district court entered an order precluding Dean "from raising or discussing at trial any of the contentions stated above," i.e., "that the defendant actually did or would do anything improper to deny plaintiff admission to the State Bar of Michigan." JA 46-47.

When Dean nonetheless tried to admit this notice at trial, the district court invoked its in limine ruling in denying Dean's request. In its denial of the motion for a new trial, the district court explained that "it would have been quite prejudicial to Byerley to,

at the last minute, change the focus of Dean's complaint from chilling his picketing rights to interfering with his bar application." JA 79-80. By any measure, the district court's ruling was correct. Instead of defending a claim for emotional distress allegedly caused by the chilling effect on Dean's continued picketing, the introduction of the notice (and this new theory of the case) would have forced Byerley suddenly to present witnesses and exhibits supporting the reasons for the character-and-fitness inquiry into Dean's application, as enumerated in the notice, to dispel the accusation that this inquiry was in some way illegitimate. The district court acted well within its discretion in prohibiting the introduction of the application.

Dean relatedly claims that the district court abused its discretion in excluding a letter authored by Byerley and sent to the character and fitness committee memorializing the events of March 27. Regardless of whether it would have been an abuse of discretion to exclude this letter, the fact is that the district court allowed Dean to introduce the letter during his cross-examination of Byerley.

Dean next argues that the district court erred in excluding a letter to the editor published in the Michigan Bar Journal, in which a state bar member made allegations of wrongdoing against Byerley that have no connection to the factual allegations in this case. Relevant or not, the evidence amounted to hearsay, and Dean offers no argument that the evidence fit within any hearsay exception. See Larez v. City of Los Angeles, 946 F.2d 630, 643 (9th Cir. 1991).

Dean next argues that the district court wrongly excluded pleadings and briefs from unrelated litigation filed by Byerley in his capacity as attorney for the State Bar. Dean contends that Byerley's statements in those papers contradict his statements in this litigation. But Byerley was acting as an attorney, not as a party, in these other cases, and the cases at any rate concern challenges to

the bar admissions program that have no bearing on Byerley's alleged violation of Dean's First Amendment rights. The district court acted well within its discretion in refusing to admit this evidence.

Dean next challenges the admission of the testimony of a state bar investigator regarding the handling of Dean's application, claiming that it was inconsistent with the district court's decision to exclude evidence of Byerley's involvement with his bar application. But the investigator's testimony concerned the handling of Dean's application before any picketing had occurred and was used simply to give context to the first meeting between Dean and Byerley on March 16, 2001. Contrary to Dean's allegations, moreover, the district court correctly found that "no confidential information from [Dean's] character and fitness file was disclosed at trial." JA 80.

Dean lastly argues that the district court erred in admitting evidence that Dean continued to picket another house after Byerley allegedly threatened him with retribution. Dean accurately notes that the house that he picketed did not belong to a state actor and that he was therefore at no risk of having his free-speech rights chilled. But that observation does not bear on the district court's reason for accepting the evidence: namely, that it showed Dean's state of mind following Byerley's allegedly threatening actions. In what was ultimately a credibility dispute between Dean and Byerley, the district court did not abuse its discretion in allowing Byerley to introduce evidence showing that Dean, far from being in emotional distress following his picketing of Byerley's house, continued his picketing activities elsewhere that same day.

III.

For these reasons, we affirm.

APPENDIX B

E. STEPHEN DEAN, Plaintiff-Appellant, v. THOMAS K. BYERLEY, Defendant-Appellee.

No. 05-1155

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Sept. 2, 2005

Before: DAUGHTREY, MOORE, and SUTTON, Circuit Judges.

ORDER:

Upon consideration of the petition for rehearing filed by the Appellant,

IT IS ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

No. 05-889

IN THE

Supreme Court of the United States

E. STEPHEN DEAN,

Petitioner,

v.

THOMAS K. BYERLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Sixth Circuit Court of Appeals held that whether respondent acted under color of state law within the meaning of 42 U.S.C. § 1983 was a question of fact which was properly submitted to the jury.

Does the decision by the Sixth Circuit conflict with decisions by this Court or other courts of appeals?

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INTRODUCTION

The plaintiff's petition for writ of certiorari should be denied because it does not raise any issue that warrants review by this Court. The Sixth Circuit properly applied well-settled law. Because the relevant facts were in dispute, the Sixth Circuit correctly held that whether the respondent acted under color of state law was a fact question for the jury to resolve.

In an action under 42 U.S.C. § 1983, a plaintiff must prove that the defendant acted "under color of state law."

> The traditional definition of acting under color of state law requires that the defendant . . . exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' . . . It is firmly established that a defendant . . . acts under color of state law when he abuses the position given to him by the State.

West v. Atkins, 487 U.S. 42, 49-50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). On the other hand, acts taken by a person "in the ambit of their personal pursuits" are not taken under color of state law merely because the individual happens to be a public official. *Screws v. United States*, 325 U.S. 91, 111, 65 S. Ct. 1031, 1040, 89 L. Ed. 1495 (1945); *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001).

In previous decisions, the Sixth Circuit held that disputed factual questions as to whether a defendant acted under color of state law should be decided by a jury with proper

instructions.[1] Decisions by this Court and other courts of appeals similarly recognize the jury's role in such circumstances.[2]

In this case, there were disputed factual issues concerning application of the color-of-state-law requirement. Petitioner claimed that respondent misused his authority as an official of the State Bar of Michigan by threatening to take adverse action against petitioner's pending bar application and to have him arrested in retaliation for picketing. Respondent denied making any such threats – and denied taking any other actions which would have allowed the jury to infer that he was acting in his official capacity. Instead, respondent told petitioner to stay off his private property, motivated by personal concerns about his family's safety arising from petitioner's previous threatening and troublesome behavior.

The district court properly submitted those factual disputes to the jury with instructions on the "color of state law" element of petitioner's § 1983 claim. The jury obviously did not believe petitioner's version of the events on the day in question and found for respondent on all counts.[3]

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1. *Chapman v. Higbee Company*, 319 F.3d 825, 834 (6th Cir. 2003) (*en banc*), *cert. denied*, 542 U.S. 945, 124 S. Ct. 2902, 159 L. Ed. 2d 827 (2004); *Layne v. Sampley*, 627 F.2d 12 (6th Cir. 1980).

2. *Adickes v United States*, 398 U.S. 144, 90 S.Ct. 1598, 26 L. Ed. 2d 142 (1970); *Zambrana-Marrero v. Suarez-Cruz*, 172 F.3d 122, 127-29 (1st Cir. 1999); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611-13 (5th Cir. 1980); *Gibson v. City of Chicago*, 910 F.2d 1510, 1517 (7th Cir. 1990); *Dossett v. First State Bank*, 399 F.3d 940, 949-50 (8th Cir. 2005); *Dang Vang v Vang Xiong X. Twoed*, 944 F.2d 476, 480 (9th Cir. 1991); *Whitney v. State of New Mexico*, 113 F.3d 1170, 1174-75 (10th Cir. 1997); *Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263, 1276-79 (11th Cir. 2003).

3. On appeal, respondent did not challenge the sufficiency of the evidence in support of the jury's verdict.

In its unpublished opinion, the Sixth Circuit affirmed the denial of petitioner's motion for new trial, holding that:

> "Although it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." *Chapman v. Higbee Co.*, 319 F.3d 825, 834 (6th Cir. 2003) (*en banc*) (quotations omitted). In the initial decision in this action, the court decided that this was just such a case given Dean's and Byerley's divergent accounts of what happened on the morning of March 27th when Dean picketed the Byerley residence. The court therefore "conclude[d] that Dean created a genuine issue of material fact as to whether Byerley acted under color of state law." *Dean*, 354 F.3d at 544. In the aftermath of this conclusion, it was not only proper, but indeed quite necessary, for the district court to submit the "color of state law" question and the competing factual allegations surrounding it to the jury. *[Opinion – Appendix 4a]*

This decision is both correct and unremarkable. It does not conflict with decisions by this Court or any other court of appeals. The petition simply does not present any issues worthy of this Court's consideration.

STATEMENT OF THE CASE

Petitioner was a law school graduate who applied for admission to the State Bar of Michigan ["State Bar"]. Respondent was the Director of Professional Standards for the State Bar. Petitioner and two other persons picketed in front of respondent's home on March 27, 2001. Petitioner's complaint alleged that respondent "told him that because of his picketing the State Bar of Michigan and his home Plaintiff would never be allowed to practice law in the state of Michigan" and that "he was going to have Plaintiff arrested for picketing." He also asserted state law claims, alleging that respondent defamed him and intentionally drove his vehicle toward him and the other picketers. Respondent denied these allegations as untrue.

On March 18, 2002, the district court granted summary judgment and dismissed petitioner's § 1983 claim, concluding that, as a matter of law, the respondent had not acted under color of state law. The state law claims were dismissed without prejudice.

On appeal, the Sixth Circuit reversed, concluding that "[petitioner] created a genuine issue of material fact as to whether [respondent] acted under color of state law." *Dean v. Byerley*, 354 F.3d 540, 544 (6th Cir. 2004). The case was remanded for further proceedings consistent with the opinion. *Id.* at 559.

A jury trial was held on October 20, 21 and 22, 2004. By general verdict, the jury found that petitioner did not prove any of his four causes of action against respondent. Judgment was entered on October 25, 2004. The Sixth Circuit affirmed the district court's denial of petitioner's motion for new trial.

REASONS FOR DENYING THE PETITION

The Sixth Circuit's holding – that disputed questions of fact as to whether a defendant acted under color of state law should be submitted to a jury – is consistent with the decisions by other courts of appeals. It also conforms to this Court's analysis in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), which holds that an action under § 1983 seeking legal relief is an "action at law" within the meaning of Seventh Amendment right to jury trial. Petitioner received the jury trial that he demanded. And he lost.

THE SIXTH CIRCUIT'S HOLDING IS CONSISTENT WITH DECISIONS BY THIS COURT AND OTHER COURTS OF APPEALS.

In many cases, the "state action" or "color of state law" issue can be decided as a matter of law, such as when the defendants' role is defined by statutes or regulations[4], or when the nature of the defendant's conduct is uncontested.[5] However, in other settings, this critical element can only be determined from the evidence presented at trial. A jury must decide what the defendant did and, based on proper

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4. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982) (relationship of nursing home decisions and Medicaid regulations); *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (suspension of worker compensation benefits by private insurers as permitted by state statute).

5. *See, e.g., West v. Atkins*, 487 U.S. 42, 49-50, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (physician providing medical services to prison inmates).

instructions, whether such conduct was taken under color of state law.

In *Adickes v United States*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), the plaintiff alleged that an employee of a privately-owned restaurant and a police officer agreed to deny her service because she was accompanied by African-American students. This Court discussed the principle that a private individual may act "under color of state law" by conspiring with a governmental official to violate another's constitutional rights. Summary judgment for the defendant was reversed, because "[i]f a policeman were present, we think *it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding* that petitioner should be refused service." *Id.*, 398 U.S. at 158-59, 90 S. Ct. at 1610 (emphasis added).

In its unpublished opinion, the Sixth Circuit relied on *Chapman v. Higbee Company*, 319 F.3d 825 (6th Cir. 2003) (*en banc*), *cert. denied*, 542 U.S. 945, 124 S. Ct. 2902, 159 L. Ed. 2d 827 (2004). In *Chapman*, the plaintiff alleged that her constitutional rights were violated when she was stopped and searched by a store security officer. The security officer was an off-duty sheriff's deputy who was wearing his official uniform, badge and gun. The district court granted summary judgment to the defendant, finding that the security officer was not acting under color of state law. The Sixth Circuit reversed in an *en banc* opinion, holding that there was a genuine issue of material fact which should be resolved by the jury.

> The inquiry is fact-specific, and the presence of state action is determined on a case-by-case basis. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Although "it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." *Id.* at 834.

Chapman relied on *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980). In that case, a police officer responded to a domestic disturbance call at the plaintiff's home. Three days later, the plaintiff encountered the officer who was on vacation. An argument ensued. The plaintiff was shot. The district court set aside the jury's verdict for the plaintiff, concluding that the officer was not acting under color of state law. The Sixth Circuit reversed and reinstated the verdict.

> Although in certain cases, it is possible to determine the question whether a person acted under color of state law as a matter of law, . . . *there may remain in some instances "unanswered questions of fact regarding the proper characterization of the actions" for the jury to decide. . . .*
>
> In this case, the trial judge fully instructed the jury of the meaning of color of law and related issues. *Id.* 627 F.2d at 13 (emphasis added and internal citations omitted).

The highlighted language from *Layne* has been cited by other circuits. *Focus on the Family v. Pinellas Suncoast*

Transit Authority, 344 F.3d 1263, 1276-79 (11th Cir. 2003); *Gibson v. City of Chicago*, 910 F.2d 1510, 1517 (7th Cir. 1990).

Other courts of appeals similarly recognize the importance of the jury's role when there are factual disputes relating to whether a defendant was acting under color of state law. *See Dang Vang v Vang Xiong X. Twoed*, 944 F.2d 476, 480 (9th Cir. 1991) (evidence was sufficient for jury to conclude that state employee acted under color of state law when raping refugee); *Griffin v City of Opa-Locka*, 261 F.3d 1295, 1303-04 (11th Cir. 2001) (jury reasonably concluded that city manager acted under color of state law when sexually harassing and assaulting employee); *Dossett v. First State Bank*, 399 F.3d 940, 949-50 (8th Cir. 2005) (evidence was sufficient for jury to conclude that school official acted under color of state law; instruction was erroneous); *Zambrana-Marrero v. Suarez-Cruz*, 172 F.3d 122, 127-29 (1st Cir. 1999) ("sufficient indicia of official police action that a jury . . . could conclude that they acted under color of state law, albeit in clear abuse of their authority."); *Whitney v. State of New Mexico*, 113 F.3d 1170, 1174-75 (10th Cir. 1997) (allegations, if substantiated at trial, would be sufficient for claim of sexual harassment under color of state law within § 1983); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611-13 (5th Cir. 1980) (determination "must be made by sifting facts and weighing circumstances case-by-case"; disputed factual issues concerning involvement of state officials required trial).

The submission of disputed factual questions to the jury necessarily follows from the holding in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). Because an action for money damages under § 1983 is an "action at law" within

the Seventh Amendment, issues of fact should be determined by a jury based on appropriate instructions. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657, 55 S. Ct. 890, 79 L. Ed. 1636 (1935).

Petitioner's argument that respondent admitted that he acted under color of state law is simply wrong. In its initial opinion reversing summary judgment for respondent, the Sixth Circuit "conclude[d] that [petitioner] created a genuine issue of material fact as to whether [respondent] acted under color of state law." *Dean*, *supra*, 354 F.3d at 544. On the appeal after trial, the court held that there were "competing factual allegations surrounding" the color of state law question which were properly submitted to the jury. [Opinion – Appendix 4a]

Finally, petitioner makes a half-hearted argument in his submission that the "color of state law" instruction was "grossly inadequate". [Petition, p. 7] However, as the Sixth Circuit noted, petitioner did not object to the instruction at trial. [Opinion – Appendix 4a-5a] Use of the model instruction from 3B O'Malley, *Federal Jury Practice & Instructions, Civil*, § 165.40 (5th ed.), hardly amounts to "plain error" under FED. R. CIV. P. 51(d)(2).

CONCLUSION

For these reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 05-889

In the Supreme Court of the United States

E. STEPHEN DEAN
Petitioner,

v.

THOMAS K. BYERLEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

E. STEPHEN DEAN
PRO SE PLAINTIFF
212 SOUTH MAIN ST.
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APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E. STEPHEN DEAN,
JUDGMENT IN A CIVIL CASE
v.

Case No. 5:01cv40

THOMAS K. BYERLEY,

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered for Defendant and against Plaintiff on all claims.

Ronald C. Weston, Sr.
Clerk of Court
/s/Melva I. Ludge
(By) Melva I. Ludge, Deputy Clerk
Date: October 25, 2004

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E. STEPHEN DEAN,
JUDGMENT IN A CIVIL CASE
v.

Case No. 5:01cv40

THOMAS K. BYERLEY,

OPINION

Presently before the Court is Plaintiff's motion new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. The Court will deny the motion for the reasons set forth below.

Background

Plaintiff, E. Stephen Dean ("Dean"), a graduate of law school but not a lawyer, sued Defendant, Thomas K. Byerley ("Byerley"), an employee of the State Bar of Michigan, alleging that Byerley violated Dean's First Amendment right to picket when Byerley, according to Dean, told Dean that if he continued to picket he would never become a member of the State Bar of Michigan. This picketing was done by Dean and two persons hired by Dean from the Volunteers of America at 7:30 am in a residential area. Pictures of the picketers shows persons dressed warmly on a cold day, with sweatshirt hoods over their heads. Earlier, this Court granted summary judgment for Byerley on the grounds that Byerley was not acting under color of state law when he made the alleged statement to Dean. Taking the facts in the light most favorable to Dean, the United States Court of Appeals for the Sixth Circuit reversed and said, assuming that Dean's allegations were true, that this Court erred: Dean and his hires had a constitutional right to picket in this residential area, and Byerley was acting in his

official capacity when he made the alleged remarks. See Dean v. Byerley, 354 F.3d 540 (6th Cir. 2004).

Following remand, this case was tried to a jury from October 20 through October 23, 2004. After deliberating, the jury returned a verdict for Byerley on October 23. Judgment was entered for Byerley on October 25, 2004. On November 5, 2004, Dean moved for a new trial pursuant to Fed. R. Civ. P. 59 alleging several errors by this district court. The motion is timely. See Fed. R. Civ. P. 59 (b).

Motion Standard

In determining whether a new trial should be granted, this Court must apply federal law. Clay v. Ford Motor Co., 215 F.3d 663, 672 (6th Cir. 2000). Rule 59(a) states, in pertinent part, that "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." As stated in Moore's Federal Practice § 59.13 [1] (3d ed. 2003), there is no fixed standard when applying Rule 59, and the granting of a motion for new trial is discretionary with the district court. See also Royal College Shop v. Northern Ins. Co. of N.Y., 846 F.2d 1247, 1251 (10th Cir. 1988). In this case, Dean raises errors in jury instructions, evidentiary rulings, and defense counsel's conduct as bases for a new trial. Such grounds may be proper where there were substantial errors in the admission or exclusion of evidence, or in the court's instructions to the jury, such that a miscarriage of justice would result if a new trial were not granted. Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891-92 (4th Cir. 1979); see also Schultz v. Amick, 955 F. Supp. 1087, 1105 (N.D. Iowa 1997) (stating that "where the questioned rulings fall within the court's discretion under the Federal Rules of Evidence and the substance of those rulings does not amount to plain error, there is no ground for a new trial based upon evidentiary rulings"); Moore's Federal Practice § 59.13[2] ("As a general rule, courts will not disturb jury verdicts in the absence of extreme circumstances, such as a case of manifest injustice or abuse of the jury's

function."). With these principles in mind, the Court will address the grounds submitted by Dean for a new trial.

Discussion

1. Dean claims that the court of appeals had already decided that Byerley was acting under color of state law, and, therefore, it was wrong for this Court to have submitted this issue to the jury.

This Court during the course of trial already ruled on this issue. The Sixth Circuit addressed the issue of whether Byerley was acting in the course of his employment in a situation which came to it as an appeal from summary judgment. In its ruling, the court of appeals made it clear that it was taking all of Dean's allegations as true. See Dean, 354 F.3d at 544 (stating that "we conclude that Dean created a genuine issue of material fact as to whether Byerley acted under color of state law.") This is a different standard than is applied during the trial. During the trial, Byerley denied that he told Dean that if he continued picketing he would never become a member of the State Bar. Byerley claimed that he simply told Dean that if he went or stayed on Byerley's private property, he would charge Dean with trespassing. Any citizen can charge trespassers, either civilly or criminally, of trespassing if there is in fact trespassing. There is no state action if one does so. Byerley did not lose his rights as an ordinary citizen simply because he works for the State Bar of Michigan. Therefore, the jury was free to believe Byerley and disbelieve Dean about what was said during the brief confrontation in Byerley's driveway.

2. Dean claims that this Court admitted unfair and prejudicial evidence and that he was the victim of improper statements by defense counsel.

Dean claims that he was prejudiced by defense counsel's opening statement and by the admission into evidence of prior litigation instituted by Dean. As to the opening statement, Dean is vague about the particular statement that he thinks is prejudicial. In

any event, the jury was told that the opening statement was merely an outline of the evidence and that it would have to make its decision based solely on the evidence. As to the introduction of evidence regarding past litigation, this Court prohibited Byerley from introducing evidence of several lawsuits filed by Dean. This Court did, however, allow Byerley to introduce certain correspondence between Dean and the State Bar relating to certain lawsuits filed by Dean because these cases were part and parcel of the State Bar's investigation into Dean's character and fitness to practice law in Michigan. In this regard, Dean was treated no differently than any other applicant to the State Bar. Furthermore, this evidence was very relevant to the issue of what was delaying the processing of Dean's application in that Dean would not furnish the information requested by the State Bar. This cut against Dean's argument that he was being singled out for retribution because he picketed Thomas Cooley Law School. Finally, this Court instructed the jury at the time the evidence was admitted that the evidence was admitted solely to show the application process and the possible reasons for its delay and could not be considered by them as to whether Dean had a litigious personality.

3. Dean also complains that he was not allowed to present evidence at the trial.

At the outset, Dean admits that the erroneous exclusion of evidence would not be grounds for a new trial unless the admission of the evidence would have led to a different result. See Morales v. Am. Honda Motor Co., 151 F.3d 500, 514 (6th Cir. 1998). Moreover, Fed. R. Civ. P. 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the

proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.

Dean claims that he should have been allowed to introduce evidence that Byerley complained about Dean's picketing to the State Bar Grievance Committee because Byerley was allowed to introduce evidence of Dean's picketing the president of Cooley Law School immediately after he picketed Byerley's house. The evidence of what happened to Dean's application after the picketing had minimal relevance because Dean's entire complaint revolved around statements that Byerley allegedly made to Dean by Byerley's driveway. The issue of what happened to Dean's application and anything that Byerley said about Dean was actually disposed of by Magistrate Judge Brenneman's ruling denying Dean's motion to amend. During the hearing on the motion before Magistrate Judge Brenneman, Dean said that he was not alleging that Byerley did or did not do anything improper to deny Dean admission to the bar. In response to Magistrate Judge Brenneman's inquiry regarding whether Dean was alleging that Byerley "actually did anything to prevent [Dean] from being admitted to the bar," Dean responded, "That's absolutely right. I am not alleging that." (8/15/01 Hr'g Tr. at 8.) Dean did not appeal this ruling; nor did he move to file a supplemental complaint. Therefore, it would have been quite prejudicial to Byerley to, at the last minute, change the focus of Dean's complaint from chilling his picketing rights to interference with his bar application. Since Dean did not know about any alleged interference with his bar application at the time he made the above remarks, it can hardly be said that whatever, if anything, Byerley did about his application somehow affected Dean's picketing rights.

In contrast, as to the admission of subsequent picketing by Dean immediately after the Byerley picketing, this evidence was relevant to Dean's claim that his picketing was "chilled" by Byerley's alleged statement and any damages that Dean might claim.

Dean claims that he should have been allowed to introduce evidence about Byerley's alleged misrepresentations to federal

courts as reflected in "the State Bar of Michigan's own official publication, ..." This reference was not any type of official action or canon of the State Bar. It was simply a letter to the editor of the State Bar magazine which expressed that member's opinions. There is no basis for admitting this so-called evidence because it was not evidence of anything.

Dean claims that this Court should not have admitted the testimony of Keith Wilkinson about Dean's character and fitness while precluding Dean from producing evidence concerning Byerley's adverse statements to the Character and Fitness committee. The Court disagrees. Wilkinson's testimony provided background regarding Dean's complaints about the State Bar and was relevant to show the reasons for the delay in the processing of Dean's State Bar application and to give context to the events of March 27, 2001. Moreover, contrary to Dean's assertion, no confidential information from his character and fitness file was disclosed at trial. Therefore, the admission of such testimony did affect Dean's substantial rights or result in a miscarriage of justice.

Dean claims that this Court instructed him to limit his evidence to events outside of Byerley's home while permitting Byerley to introduce evidence of picketing outside of the president of Cooley Law School's home, which, according to three witnesses and police records, occurred shortly after Dean left the Byerley home. The admission of the other picketing was relevant to the issue of Dean's claim that he was afraid of picketing because of what Byerley had said to him. Dean was not prohibited from introducing evidence on this issue. In fact, Dean testified in direct contradiction to the president's testimony, the president's neighbors' testimony (as to the date of this picketing), and to the police department record of responding to a call (as to the time and date of this picketing).

4. Dean claims that the Court should not have admitted testimony about picketing outside of the Cooley Law School and outside of its professors homes.

Dean must have forgotten that he testified and argued during the course of the trial that his picketing of the Cooley Law School must have been known to employees of the State Bar because the law school is near the State Bar Building. This was part of Dean's argument that the intent of Byerley was to chill Dean's First Amendment right to picket. In addition, this Court allowed evidence of the picketing of the homes of the president of the law school and a professor of the law school because they occurred right after the picketing of Byerley's house. This was relevant to the issue of damages and whether, as Dean claimed, he really was afraid to picket after his alleged confrontation with Byerley.

5. Dean claims that his trial was unfair because Byerley had access to privileged information in his Character and Fitness file and the Court subsequently ruled that Dean could not introduce evidence of Byerley's improper attempt to stop Dean from becoming a lawyer.

What occurred in the Character and Fitness investigation of Dean was relevant only to the extent that it showed the jury what was delaying Dean's application. As stated above, Magistrate Judge Brenneman ruled, based upon Dean's own admissions, that Dean could not introduce evidence that Byerley improperly interfered with Dean becoming a member of the State Bar. Therefore, evidence regarding Byerley's actions subsequent to Dean's picketing at Byerley's home was irrelevant to Dean's claim in this case.

6. Dean claims that the Court erred in allowing Byerley to add the new affirmative defense of trespassing.

Assuming that trespass would constitute an affirmative defense in this case, as opposed to a defense which merely negates an element of Dean's claim (which the Court is inclined to conclude it is), Dean was aware prior to trial that Byerley intended to raise an issue as to whether Dean was trespassing on Byerley's property. (Pl.'s Trial Br. at 4 (("The Defendant has suggested that

he is going to allege that Plaintiff was trespassing on Defendant's property, even though in representations made in this Court and on appeal, Defendant took the position that it was 'not clear' if a trespass took place.").) Thus, Dean had ample notice that Byerley would claim that Dean was trespassing, and Dean has failed to show how he was prejudiced by the admission of Byerley's testimony on that issue. Moreover, the issue of whether Dean was trespassing is relevant to the issue of Dean's and Byerley's credibility as to what was said in Byerley's driveway.

Conclusion

For the foregoing reasons, the Court will deny Dean's motion for new trial. An Order consistent with this Opinion will be entered.

Dated: January 5, 2005 /s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E. STEPHEN DEAN,
JUDGMENT IN A CIVIL CASE
v.

Case No. 5:01cv40

THOMAS K. BYERLEY,

ORDER

In accordance with the Opinion filed on this date, IT IS HEREBY ORDERED that Plaintiff's Motion For New Trial (docket no. 147) is DENIED.

Dated: January 5, 2005 /s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE